IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.295 of 1997

For Approval and Signature:
HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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DAHYABHAI @ MAHENDRABHAI KALABHAI - Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MS NEETA J MERCHANT for Appellant.
MR ND GOHIL, APP for Respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 20/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 (“the Code” for short) is directed against judgment dated February 25, 1997

rendered by the learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur at Ahmedabad, in Sessions Case No.71 of 1996 by which the appellant is convicted under Section 302 of the Indian Penal Code (“IPC” for short) for causing murder of his wife Ms.Kankuben and sentenced to suffer imprisonment for life.

2. The facts emerging from the record of the case are as under:

Deceased Kankuben was youngest daughter of Virabhai Pujabhai, who is resident of Village Mandali, District : Mehsana. The marriage of the deceased took place with the appellant at Village Mandali. The appellant is residing at Rohitnagar, Ghatlodia, Ahmedabad. After two years of marriage, the deceased started residing with the appellant at Rohitnagar. The appellant had bad habit of consuming liquor. After consuming liquor, he used to subject the deceased to physical and mental cruelty. During the subsistence of her marriage with the appellant, the deceased gave birth to a boy named Hitesh. The deceased with her son Hitesh visited her parental house at Mandali. There Hitesh was afflicted by smallpox and died. Thereupon, the appellant

entertained a doubt that because of carelessness of the deceased, he had lost his son. The appellant did not permit the deceased to stay with him as a result of which, the deceased had to stay at her parental house. On January 16, 1995, the deceased filed Criminal Misc. Application No.4 of 1995 in the Court of learned Judicial Magistrate First Class, Kheralu, under Section 125 of the Code and claimed maintenance at the rate of Rs.500=00 per month from the appellant. During the pendency of the said proceedings, a compromise was arrived at between the deceased and the appellant pursuant to which, the application for maintenance filed by the deceased was disposed of vide order dated December 14, 1995. After compromise, the deceased started residing with the appellant at Rohitnagar, Ghatlodia, Ahmedabad. The incident in question took place on December 18, 1995, i.e. only after four days of entering into compromise. On December 19, 1995, the appellant brought the deceased to Civil Hospital, Ahmedabad, in a burnt condition at about 00.20 AM. Dr.Ritaben Pravinchandra Shah was on duty in Emergency Ward of the hospital. On inquiry being made by Dr.Ritaben, the deceased narrated before her that she was set on fire by the appellant after pouring kerosene over her at 10.30 PM on December 18, 1995. The doctor recorded

history of assault as narrated by the deceased in medical papers and referred the deceased to the Unit of Dr.S.S.Vyas for further treatment. Dr.Ritaben also tried to know from the appellant as to what had happened and the appellant informed the Medical Officer that the deceased locked herself in a room and burnt herself. In view of the history narrated by the deceased before Dr.Ritaben, she summoned Police Constable Jivrajkumar Valjibhai Pandor, who was on duty at Civil Hospital and informed him that as the appellant had set the deceased on fire after pouring kerosene over her, necessary information should be conveyed to Ghatlodia Police Station. Police Constable Jivrajkumar noted down the information conveyed to him by Dr.Ritaben in verdhi-book maintained at the Civil Hospital and conveyed necessary information to Police Station Officer of Ghatlodia Police Station on phone. The information conveyed was noted down by PSO in the book maintained at the Police Station. He, in turn, conveyed the information to Mr.V.M.Barot, who was then Police Inspector of Ghatlodia Police Station. On receipt of the information, Mr.Barot addressed a *yadi* to Executive Magistrate to record dying declaration of the deceased. He thereafter proceeded to the hospital in a government vehicle. On way, he received the message

from mobile-van that it was necessary to inform the Executive Magistrate whether the injured whose dying declaration was to be recorded, was conscious and that on receipt of the information, he would come to the hospital for recording dying declaration. After reaching Civil Hospital, Ahmedabad, PI Mr.Barot ascertained from the Medical Officer as to what was condition of injured Kankuben. He was informed that Kankuben expired at 1.25 AM. Mr.Barot made inquiries with the doctors and learnt that Dr.Mrunali Parikh, who had treated the deceased, had also recorded history of assault as narrated by the deceased, which implicated the appellant. Neither the appellant nor any one else was inclined to lodge complaint with regard to the incident in question. Therefore, PI Mr.Barot lodged complaint with Ghatlodia Police Station against the appellant. The complaint lodged by Mr.Barot was investigated by Mr.A.C.Patel, who was then PSI of the Police Station. The Investigating Officer went to the place of incident and drew its panchnama. He also recorded statements of those persons who were found to be conversant with the facts of the case. He made arrangements for sending the dead body of the deceased for postmortem examination. Postmortem examination on the dead body of the deceased was

conducted by a panel of doctors. The investigation revealed that the deceased was also subjected to cruelty within the meaning of Section 498A IPC by Kalabhai Somabhai, i.e. father of the appellant, and Kanubhai Kalabhai, i.e. brother of the appellant. On completion of investigation, the appellant and two others were chargesheeted in the Court of learned Judicial Magistrate First Class, Ahmedabad (Rural), for commission of offences punishable under Sections 498A, 302 read with Section 114 IPC.

3. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Ahmedabad (Rural), for trial where it was numbered as Sessions Case No.71 of 1996.

4. The learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur at Ahmedabad, to whom the case was made over for trial, framed necessary charge against the appellant and two others at Exh.3. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) panch Govindbhai Panabhai as P.W.-1 at

Exh.9; (2) PI Mr.Vinodkumar Muljibhai Barot as P.W.-2 at Exh.11; (3) Head Constable Jivrajkumar Valjibhai Pandor as P.W.-3 at Exh.14; (4) mother of the deceased, i.e. Galaben Virabhai as P.W.-4 at Exh.22; (5) father of the deceased, i.e. Virabhai Pujabhai as P.W.-5 at Exh.23; (6)panch Kishorebhai Durgaji as P.W.-6 at Exh.25; (7) brother of the deceased, i.e. Jayantibhai Virabhai, as P.W.-7 at Exh.27; (8) maternal uncle, i.e. Muljibhai Mankabhai, as P.W.-8 at Exh.28; (9) Investigating Officer Mr.A.C.Patel as P.W.-9 at Exh.29; (10) Dr.Ritaben Pravinchandra Shah as P.W.-10 at Exh.30; (11) Dr.Gaurang Govindbhai Kothari as P.W.-11 at Exh.32; and, (12) Dr.Mrunali Nitinbhai Parikh as P.W.-12 at Exh.35, to prove its case against the appellant and others. The prosecution also produced documentary evidence such as panchnama of place of incident at Exh.10; complaint lodged by PI Mr.Barot at Exh.12; extract of entry made at the Police Station pursuant to information conveyed by Police Constable Jivrajkumar at Exh.13; similar entry produced by Head Constable Jivrajkumar from verdhi-book maintained at Civil Hospital at Exh.15; panchnama indicating seizure of clothes of the deceased at Exh.18; panchnama indicating seizure of clothes of the appellant at Exh.19; inquest report at Exh.26; medical papers of

deceased Kankuben produced by Medical Officer Dr.Ritaben at Exh.31; postmortem notes of the deceased at Exh.33; medical papers of the deceased produced by Dr.Mrunaliben Parikh at Exh.36, etc. in support of its case against the appellant and others.

5. After recording of evidence of prosecution witnesses was over, the learned Judge of the trial Court explained to the appellant and two others the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code. In his further statement, the appellant claimed that it was not true that he was not ready to permit the deceased to stay with him. The appellant claimed that at the time of incident, he was not present in his house. However, no defence evidence was adduced by any of the accused.

6. On appreciation of evidence led by the prosecution, the learned Judge of the trial Court held that it was not proved by the prosecution that deceased Kankuben was subjected to cruelty by the appellant and/or other accused on the ground that she was responsible for death of Hitesh, who was afflicted by smallpox and,

therefore, commission of offence punishable under Section 498A IPC was not established. However, the learned Judge referred to the history of assault narrated by the deceased before two doctors and held that they were dying declarations of the deceased, which implicated the appellant fully. The learned Judge of the trial Court after noticing the contents of those dying declarations, held that it was proved by the prosecution beyond reasonable doubt that on the day of incident, the appellant had poured kerosene over the deceased and caused her murder by setting her on fire. In view of abovereferredto conclusions, the learned Judge has acquitted original accused Nos.2 and 3, but convicted the appellant under Section 302 IPC and imposed sentence referred to earlier by judgment dated February 25, 1997, giving rise to instant appeal.

7. Pursuant to order dated April 26, 2004 passed by the Division Bench comprising B.J.Shethna & J.R.Vora, JJ., notice was issued to the appellant calling upon him to make alternative arrangement for his appearance in the matter. On receipt of the notice, a letter dated September 9, 2005 was forwarded by the appellant to Hon'ble the Chief Justice with a request to make free

legal services available to him. In view of the request made by him, Ms.Nita Merchant, learned counsel practising in the Court, was requested to render legal aid to the appellant. The learned counsel has accordingly rendered excellent aid to the appellant.

8. Ms.Nita Merchant, learned counsel of the appellant contended that neither the mother nor the father nor the brother of the deceased has supported the prosecution and, therefore, the learned Judge of the trial Court was not justified in convicting the appellant under Section 302 IPC merely relying upon so-called history of assault narrated by the deceased and, therefore, the judgment impugned in the appeal deserves to be set aside. It was maintained by the learned counsel of the appellant that the evidence tendered by the prosecution to prove oral dying declarations of the deceased is neither satisfactory nor inspiring confidence and, therefore, the appellant should be acquitted. What was stressed was that after receipt of 93% burns on the body, the deceased must have been rendered unconscious and, therefore, the trial Court was not justified in acting upon oral dying declarations of the deceased. The learned counsel of the appellant pleaded that the

contents of panchnama would show that door, which was locked from inside, was broken open which, in turn, probabilises the defence of the appellant that the deceased had committed suicide after locking herself in the room and, therefore, unwarranted conviction of the appellant should be set aside. It was contended that it is not probable that the deceased, who was Gujarati, would make declaration in Hindi language at the time of her death and, therefore, the learned Judge of the trial Court was not justified in acting upon the same. According to the learned counsel of the appellant, in view of unreliability of two oral dying declarations allegedly made by the deceased before the two doctors, the conviction of the appellant under Section 302 IPC should not be confirmed by this Court more particularly when original accused Nos.2 & 3, who were prosecuted along with the appellant, have been acquitted by the trial Court and their acquittal is not challenged by the State before this Court. The learned counsel of the appellant asserted that the evidence on record is not appreciated by the learned Judge of the trial Court in its true perspective and, therefore, the appeal should be allowed.

9. Mr.N.D.Gohil, learned Additional Public Prosecutor for the respondent, contended that Exh.38, which is a copy of application filed by the deceased for maintenance against the appellant, indicates that the deceased was subjected to cruelty by the appellant on the ground that the deceased was responsible for death of son of the appellant and, therefore, the evidence led by the prosecution should be appreciated by the Court in the light of the averments made by the deceased in the application for maintenance. According to the learned counsel of the respondent, neither it is suggested nor it is brought on record that either Medical Officer Dr.Ritaben Shah or Medical Officer Dr.Mrunali Parikh was interested in the deceased or on inimical terms with the appellant and, therefore, the assertion made by them that the deceased made oral dying declarations before them implicating the appellant should be accepted by the Court. It was argued that though close relatives of the deceased have not supported the prosecution, but the case of the prosecution stands satisfactorily established by clear, unequivocal, categorical and reliable dying declarations of the deceased as a result of which, well-founded conviction of the appellant under Section 302 IPC should be upheld by the Court. The learned counsel

pointed out to the Court that no attempt worth the name was made by the appellant to probabilise his defence of alibi pleaded in his further statement, which is a circumstance against him and after taking into consideration that circumstance with other facts proved by the prosecution, the conviction of the appellant should be confirmed by the Court. What was asserted was that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellant under Section 302 IPC and as the learned counsel of the appellant has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

10. This Court has heard Ms.Nita Merchant, learned counsel of the appellant, and Mr.N.D.Gohil, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

11. The fact that incident in question took place on December 18, 1995 in building No.12/126 situated in

Rohitnagar, which is near Jantanagar Railway Crossing, Ghatlodia, Ahmedabad, is not in dispute. It is also not in dispute that the appellant was residing in the said building with the deceased after compromise was arrived at between him and the deceased in Criminal Misc. Application No.4 of 1995, which was filed by the deceased in the Court of learned Judicial Magistrate First Class, Kheralu, for claiming maintenance from the appellant. The fact that the appellant had brought the deceased at Civil Hospital at 00.20 hours on December 19, 1996 in burnt condition is also not in dispute. The prosecution has heavily relied upon two oral dying declarations made by the deceased before the two Medical Officers, who were on duty at the Civil Hospital, Ahmedabad.

12 Before appreciating the evidence of the witnesses and the contents of dying declarations, it would be relevant to notice the law relating to dying declaration. Section 32(1) of the Indian Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32 when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause

of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a persons is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause of circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law

as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Courts have to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. It is also well settled that it is not necessary that recording of dying declaration should be in the form of

question and answer. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncements in order to answer the question whether the dying declaration is true:-

(1) Was the victim in a position to identify the assailant/s?

(2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities?

(3) Whether any material part is proved to be false by other reliable evidence?

(See : (1) Khushall Rao v. State of Bombay (1958) SCR 552; (2) Tarachand Damu Sutar v. State of Maharashtra (1962) 2 SCR 775; (3) Kusa and Ors. v. State of Orissa, (1980) 2 SCC 207; (4) Meesala Kundulal Bala Subrahmaniyam and another v. State of A.P., (1993) 2 SCC 684; (5) Meesala Ramkrishna v. State of A.P., (1994) 4 SCC 181; (6) Govardhan Raoji Ghyare v. State of Maharashtra, 1993 Suppl. 4 SCC 316; (7)

Gangotri Singh v. State of U.P. 1993 Suppl. 1 SCC 387; (8) Smt.Paniben v. State of Gujarat, A.I.R. 1992 SC 1817; (9) State of Rajsthan v. Kishore, JT 1996 (2) SC 595; and (10) State of U.P. v. Ameer Ali, JT 1996 (4) SC 123.)

13. The evidence adduced by the prosecution relating to dying declarations will have to be appreciated in the light of above stated principles.

13(1) Testimony of Dr.Ritaben Pravinchandra Shah, recorded at Exh.30, indicates that on December 19, 1995, she had examined deceased Kankuben, who was brought to the hospital at 12.20 hours. The Medical Officer has stated that she had recorded history of assault as narrated by the deceased wherein it was stated by the deceased that she was set on fire by her husband. The witness has mentioned in her testimony that in view of the history narrated by the deceased, she had conveyed the history of assault to Police Constable, who was wearing Buckle No.3380. The witness has thereafter stated that injured Kankuben was referred to the Unit of Dr.S.S.Vyas. According to this witness, the deceased had sustained first, second and third degree burn injuries on her face, chest, abdomen, back, etc. In support of

her assertion that she had recorded the declaration made by the deceased, she produced medical papers of the deceased at Exh.31. It was further mentioned by her that subsequent signatures appearing on Exh.31 might be of those doctors who were discharging duties in the Unit of Dr.S.S.Vyas.

13(2) In her cross-examination, the Medical Officer informed that she was discharging duties as such since 1984. The doctor in her cross-examination stated that on December 19, 1995, she was on night duty. The defence wanted to know from her whether she was knowing as to in which vehicle the deceased was brought to the hospital and in reply thereto, she pleaded ignorance. The suggestion made by the defence that the deceased was accompanied by the appellant was accepted by her. However, it was stated by her that she was not knowing as to whether the deceased was accompanied by her father-in-law or brother-in-law. According to the Medical Officer, after examining the injured, she had informed the concerned Unit of the hospital. The witness has informed the Court that till the injured was removed to the Unit of Dr.S.S.Vyas, she was in Casualty Ward of the hospital. The suggestion made by the defence that in case of late arrival of the doctor from the concerned Unit,

the death of the patient would take place, was emphatically denied by her. In cross-examination, the Medical Officer has informed the Court that she had no talk whatsoever with any of the relatives of the injured and that she was not knowing that father and mother of the deceased had arrived at the hospital. After accepting the suggestion made by the defence that the deceased had sustained 93% burns, it was stated by the Medical Officer that immediately, she had conveyed necessary information to the Police. The suggestion made by the defence that she was knowing the fact that the Police had conversation with the appellant after which, the information was conveyed at the Police Station, is denied by her. The suggestion made by the defence that she had not tried to know history of assault from the deceased is also emphatically denied by her. According to the Medical Officer, she had asked injured Kankuben only one question. According to her, she was not knowing whether Kankuben was literate or illiterate or whether she was Gujarati or non-Gujarati. The suggestion made by the defence that injured Kankuben was not able to speak and had not spoken anything, is emphatically denied by her.

13(3) This is all what transpires from the evidence of Dr.Ritaben. On reappreciation of evidence of Dr.Ritaben,

it becomes evident that in discharge of her official duties, she treated the injured, who was brought in burnt condition in Emergency Ward of the Civil Hospital. It was but natural for her to make inquiry with the patient as to what had happened to her. Therefore, her assertion that in answer to question put by her, the deceased had narrated before her that she was set on fire by her husband, inspires the confidence of this Court. The Medical Officer stands fully corroborated by the medical papers produced by her at Exh.31. In the medical papers also, it is mentioned that the deceased, who was brought to the hospital at 0.20 AM on December 19, 1995, had stated that she was set on fire by her husband at 10.30 PM on December 18, 1995. It is relevant to notice that it could not be even remotely suggested by the defence that this Medial Officer was either interested in the deceased or was on inimical terms with the appellant and was, therefore, out to falsely implicate the appellant. There are no major contradictions or omissions appearing in her evidence. The Medical Officer has deposed before the Court in a natural manner and as her testimony gets complete corroboration from contemporary documents prepared by her, this Court is of the opinion that the learned Judge of the trial Court was justified in coming to the conclusion that the oral dying declaration of the

deceased was satisfactorily proved by Medical Officer Dr.Ritaben.

13(4) Testimony of Dr.Mrunaliben Parikh, recorded at Exh.35, indicates that in the year 1995, she was prosecuting 2nd year study of M.S. after passing M.B.B.S. Examination. Her testimony shows that it was part of her duty to attend patients admitted in the hospital and was on duty for 24 hours. The witness has mentioned that on December 19, 1995, injured Kankuben was transferred from Casualty Ward to Ward No.E/3 and that, as usual, she had noted down the history narrated by injured Kankuben. The witness has mentioned that it was stated by the deceased that she was set on fire by her husband and thereafter, after recording history of assault as narrated by her, she had treated the injured but, after sometime, the deceased had developed breathing trouble and expired within 20 minutes. The witness has asserted before the Court that at the time of stating history of assault, the deceased was fully conscious. The medical papers of the deceased have been produced by the witness at Exh.36.

13(5) In her cross-examination by the learned counsel of the defence, it is stated by the witness that she was discharging duties in the Civil Hospital since one-and-a-

half year. According to her, a patient, who is examined in Casualty Ward, would be transferred to concerned Ward and the patient would be transferred to concerned Ward with medical papers prepared by the Casualty Ward. The witness has explained that it is true that nature of injuries sustained by the patient can be ascertained by looking to the papers of the Casualty Ward and same can be ascertained by examining the patient also. The witness has asserted in her cross-examination that when injured Kankuben was transferred to Ward No.E/3, a ward-boy had accompanied her with medical papers of the Casualty Ward and the appellant was also with her. The witness has stated that she was not knowing whether father-in-law of Kankuben was present or not. According to this witness, she had also tried to know history of incident from the appellant and the history stated by the appellant was also noted down in the medical papers. The witness has mentioned that she had read the papers forwarded from the Casualty Ward and also noticed the history of assault mentioned therein. According to her, before examining the patient, normally history of assault is being narrated and, therefore, though history of assault was mentioned in papers of Casualty Ward, she had again tried to know the history of assault from injured Kankuben. The witness has mentioned that in order to verify the

correctness of the history mentioned in the papers of Casualty Ward, the history of assault is being ascertained from the patient. The witness has stated that she was not knowing whether any Police Officer had met her on the day of incident. In her cross-examination also, the witness has asserted that personal history, family history and history of assault mentioned on Page 2 of the medical papers at Exh.35 were written down by her in English after asking relevant questions to injured Kankuben. The witness has stated before the Court that she was not knowing in which language she had put questions to injured Kankuben, but has asserted that answers which were given by injured Kankuben were in Hindi. The suggestion made by the defence that no particulars of incident were mentioned by injured Kankuben in Hindi, is emphatically denied by this witness. The suggestion made by the defence that injured Kankuben was not knowing Hindi language is also denied by her. The suggestion made by the defence that she had noted down the whole history of assault after asking question to the husband of the deceased, is also denied by her. The suggestion made by the defence that on the basis of history of assault mentioned in the papers of Casualty Ward, she had noted down history of assault in case papers prepared by her, is denied by this witness.

According to the witness, the injured had developed breathing trouble after twenty minutes of her transfer from the Casualty Ward. The suggestion made by the defence that she had received call to attend injured Kankuben when she was in the hostel, is also denied by her. It is explained by the witness that Resident Doctor of the hospital has no “visiting hours”. The witness has further explained that in each Ward, there are seven to eight Resident Doctors and one or the other doctor would be on duty for 24 hours. The witness has admitted the suggestion made by the defence that injured Kankuben might have developed breathing trouble because of smoke inhaled by her. According to her, on examining injured Kankuben, she had realized that her condition was serious, but first priority of her was to attend the injured and not to make arrangements for recording dying declaration of the injured. The witness has also stated that in her Ward, ward-boy and nurse were present. The witness has admitted that she had not asked any one for making arrangements for recording dying declaration of the injured.

13(6) This is all what transpires from the testimony of Dr.Mrunali Parikh. On re-appraisal of her evidence, this Court finds that in discharge of her official

duties, she had attended injured Kankuben and recorded history of assault as would be recorded in other cases. The assertion made by the Medical Officer that the deceased was conscious and had narrated the history of assault could not be demonstrated to be false with reference to medical papers on record. The relevant feature of evidence tendered by Dr.Ritaben and Dr.Mrunali Parikh is that both of them had recorded history of incident as narrated by the appellant also. Thus, concoction stands completely ruled out. The defence could not even remotely suggest to the witness that she was on inimical terms with the appellant or was interested in the deceased. The testimony of this witness stands corroborated by contemporary document on record wherein the history of assault narrated by the deceased is recorded. The testimony of Dr.Ritaben and Dr.Mrunali Parikh is found to be quite clear, categorical and implicitly reliable. It is free from any blemish. Neither Dr.Ritaben nor Dr.Mrunali Parikh has made any material improvement nor do they stand contradicted with their earlier police statements. As the testimony of Dr.Parikh is free from blemish, the same will have to be accepted. The testimony of Dr.Parikh read with history of assault recorded in the medical papers produced at Exh.35 unerringly establishes that the deceased had made oral

dying declaration before the doctor to the effect that she was set on fire by the appellant. Thus, the case of the prosecution against the appellant stands firmly established by reliable and cogent evidence tendered by Dr.Ritaben and Dr.Mrunaliben.

14. The plea that defence of the appellant that the deceased had locked herself in a room and burnt herself stands probabilised by the contents of the panchnama of place of incident and, therefore, his conviction should be set aside, is devoid of merits. It may be mentioned that in further statement of the appellant recorded under Section 313 of the Code, what is claimed by the appellant is that he was not present at the time of incident. Meaning thereby, he pleaded alibi. If he was not present in the house when the incident had taken place, one fails to understand as to how, he had learnt that the deceased had locked herself in the room and burnt herself. Thus, the defence, which was pleaded, is found to be inconsistent with the claim advanced by the appellant in his further statement recorded under Section 313 of the Cod. Further, it is relevant to notice that the incident took place at 10.30 PM on December 18, 1995 whereas panchnama of place of incident was drawn between 10.10 hours and 13.30 hours of December 19, 1995. It is also

relevant to notice that the incident took place at about 10.30 PM on December 18, 1995, but the medical papers show that the deceased was brought to the hospital by the appellant at 00.20 hours on December 19, 1995. Thus, injured Kankuben was not removed to the hospital immediately after the incident. The panchnama, which was drawn after fourteen hours of the incident, will have to be viewed in the light of abovereferredto glaring facts. Even in the panchnama, it is mentioned that the rod of bolt fitted inside the door as well as screw and staple for locking were found lying on the floor. Meaning thereby, it was not necessary for any one to apply force for opening the door from outside. Therefore, find of signs indicating that bolt on the door fitted outside the door was struck with some iron instrument would not indicate that the door was broken open nor would it indicate that the deceased had locked herself in a room and burnt herself. Thus, the defence of the appellant that the deceased had committed suicide, is not probabilized at all and stands completely refuted in view of reliable testimony of Dr.Ritaben and Dr.Mrunali Parikh, which indicate that the appellant had set the deceased on fire.

15. Apart from oral dying declarations, which have

been satisfactorily proved by Dr.Ritaben and Dr.Mrunali Parikh, there are other tale-telling circumstances, which need special mention by this Court.

(a) The first circumstance, which deserves to be noticed, is that though the incident had taken place at about 10.30 PM on December 18, 1995, the deceased was removed to the hospital by the appellant after almost about two hours. For this no plausible explanation worth the name is offered by the appellant. If the appellant had not poured kerosene over the deceased and set her on fire and if the deceased had committed suicide as alleged by the appellant, she would have been removed to the hospital by the appellant immediately. Thus, this circumstance is not consistent with the innocence of the appellant.

(b) As observed earlier, Exh.38 is copy of Criminal Misc. Application No.4 of 1995, which was filed by the deceased in the Court of learned Judicial Magistrate First Class, Kheralu, against the appellant for claiming maintenance. In the said application, physical and mental cruelty, which was meted out by the appellant to the deceased, is

mentioned in detail. Paragraph 4 of the said application makes it evident that the appellant had asked the deceased to leave his home and go to her parental house or to end her life by jumping into a well. The averments made in that paragraph further show that after uttering filthy abuses, the appellant had dragged the deceased by tuft and while driving away the deceased from her matrimonial home, had warned her that she would be killed if attempt was made by her to return to her matrimonial home. It is relevant to notice that during the pendency of that application, a compromise was arrived at between the parties on December 4, 1995 pursuant to which, the deceased had gone to reside with the appellant and the incident in question had taken place within four days of entering into compromise. Thus, there was strong motive for the appellant to get rid of the deceased.

(c) Another circumstance, which is against the appellant, is that he had not informed the Police about the incident nor relatives of the deceased. The complaint regarding the incident had to be lodged by PI Mr.V.M.Barot after ascertaining history of assault as narrated by the deceased before the

doctors. This is quite evident from the testimony of Mr.Barot recorded at Exh.11 and the contents of the complaint produced by the prosecution at Exh.12.

(d) Yet another circumstance, which is against the appellant, is that he has failed to probabilise his claim advanced in his further statement that he was not present in the house at the time of incident. What is advanced by the appellant in his further statement is plea of alibi. Section 103 of the Evidence Act reads as under:

> *"**103.** The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*
>
> *Illustrations*
>
> *A prosecutes B for theft, and wishes the Court to believe B admitted the theft to C. A must prove the admission.*
>
> *B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it."*

It is well settled that when an accused pleads *alibi,* the burden is on him to prove it. The plea of *alibi* postulates the physical impossibility of the presence of the accused at the scene of offence by

reason of his presence at another place. The plea can, therefore, succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. The appellant has not adduced any evidence to indicate that he was at another place when the deceased received burn injuries. Thus, false plea of *alibi taken* is also a circumstance against the appellant.

15(1) The cumulative effect of above mentioned circumstances establish that in all human probability, murder of the deceased must have been committed by the appellant and appellant alone. The circumstances read with the dying declarations of the deceased recorded by the two Medical Officers are consistent with the guilt of the appellant and totally inconsistent with his innocence.

16. It may be mentioned that father, mother and brother of the deceased have not supported the prosecution case. The mother of the deceased in his earlier part of examination-in-chief has stated that she had learnt that her daughter had expired and, therefore, gone to the Civil Hospital. However, thereafter, she has

stated that on reaching hospital, she had a talk with her daughter and her daughter had informed that she had received burn injuries while cooking. It may be mentioned that the evidence on record clinchingly establishes that the relatives of injured Kankuben had reached the hospital after she had expired. If that is so, it is evident that the mother of the deceased could not have any talk with the deceased at all. There is no manner of doubt that those witnesses have been won over and, therefore, they have suppressed the truth. The learned Judge of the trial Court was justified in not placing reliance on their testimony. Notwithstanding the fact that the close relatives of the deceased have turned hostile, the case of the prosecution against the appellant stands firmly proved by the two dying declaration as well as other circumstances which have been enumerated above.

17. On re-appraisal of the evidence, this Court is of the opinion that no good ground is made out by the learned counsel of the appellant to interfere with the judgment impugned and the appeal, which lacks merits, deserves to be dismissed.

18. For the foregoing reasons, the appeal fails, and

is dismissed. *Muddamal* to be disposed of in terms of directions given by the learned Judge of the trial Court in the impugned judgment.

This Court places on record valuable and competent assistance rendered by Ms.Nita Merchant, learned counsel, to the appellant.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra